Supreme Court, U.S.
FILED
MAR 17 1980
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1979

No. 79-1437

ALAN F. TAYLOR, *Petitioner,*

vs.

COMMISSIONER OF TAXATION AND FINANCE, JOHN J. CONNORS, E. ALLEN SMITH, AND F. COLBY, *Respondents,*

and

DAVID H. GUST, *Peitioner*

vs.

JOHN J. CONNORS, *Respondent,*

and

DAVID H. GUST, *Petitioner,*

vs.

RONALD BRADSHAW, JR., *Respondent,*

and

DAVID H. GUST, *Petitioner,*

vs.

DAVID FIELDS, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SECOND CIRCUIT COURT OF APPEALS

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The Daily Record
Rochester, New York
(5822)
Spaulding Law Printing
Syracuse, New York

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vs.

DAVID FIELDS, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SECOND CIRCUIT COURT OF APPEALS

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

David H. Gust and Alan F. Taylor, Petitioners herein, pray that a Writ of Certiorari issue to review the judgements entered on December 19, 1979 by the United States Court of Appeals for

the Second Circuit affirming the order of the United States District Court for the Western District of New York dismissing the Petitioners' complaints.

OPINION BELOW

The United States District Court for the Western District of New York dismissed the Petitioners' complaints finding as fact, "plaintiff has in effect failed to file a return". The United States Court of Appeals for the Second Circuit affirmed without opinion.

JURISDICTION

Federal jurisdiction was initially invoked under Title 42 USC 1983, and Title 28 USC 1343(3). The United States District Court for the Western District ordered the complaint dismissed on May 1, 1979 and the United States Court of Appeals affirmed the lower court on December 19, 1979 without opinion. The jurisdiction of this Court is invoked under Title 28 USC 1254.

QUESTION PRESENTED

This Appeal presents the question whether a taxpayer can be penalized *by an administrative agency* solely for refusing to waive his Constitutional Privilege against self-incrimination regarding requested disclosures that have not been immunized. Stated another way, may a New York State Tax Examiner presume fraud and, solely upon that presumption, impose penalties on the Petitioners for a timely claim of Fifth Amendment Privilege in the absence of any judicial determination of the validity of that claim? THE PETITIONERS SAY "NO".

STATEMENT OF THE CASE

Petitioners filed New York State Income returns for 1977 which Respondent Connors was auditing (see addendum pages A-1 & 2). Petitioners denied requests for the disclosures sought citing the Fifth Amendment and *Garner vs. US*, below, as authorities for such denial (addendum page A-3). Petitioner Gust reasserted both his Fifth Amendment Privilege and the authority for that assertion to Respondents Bradshaw and Fields, alleged Warrant Agents for the New York State Department of Taxation and Finance, Compliance Bureau. The penalty was sustained on the presumption of violation of New York Tax Law §685(i). Petitioner Taylor's attempts to reassert his claim and authorities were summarily dismissed by Respondent Smith and a lien was placed against the Petitioner's property.

In the District Court the Respondent's counsel appeared and contended that Petitioners had failed to file a return and the penalties were imposed for that failure. The Court dismissed the complaints before the error of these contentions was exposed. The Circuit Court Failed to reach any of the questions presented and affirmed the lower court without opinion.

REASON FOR GRANTING THE WRIT

Petitioners have complied with the provisions of this Court as handed down in the case of *Garner vs. US*, 424 US 648 (1976), pertaining to withholding disclosures concurrently with a timely claim of the privilege. Respondents have punished Petitioners administratively with stringent penalties for withholding testimony that has not been immunized. [see *Lefkowitz vs. Turley*, 414 US 70 at 78 (1973); *Lefkowitz vs. Cunningham*, 431 US 273 (1977); *Gardner vs. Broderick*, 392 US 273 (1968); *Garrity vs. New Jersey*, 385 US 493 (1967); *Sanitationmen vs. Comm'r of Sanitation*, 392 US 280 (1968); *US vs. Sullivan*, 274 US 259 (1927); and *Garner vs. US*, supra]

POINT I

Respondents attack our accusatorial system of criminal justice.

The Fifth Amendment states, in relevant part, "no person . . . shall be compelled in any criminal case to be a witness against himself". *US Constitution, Amend. V.* This simple clause is the embodiment of centuries of legal evolution and stands today as one of the fundamental underpinnings of our accusatorial system of criminal justice. [see *Malloy vs. Hogan,* 378 US 1 at 7 (1964)]. The privilege is a personal one [*Couch vs. US,* 409 US 332 at 388 (1973)] and is available to both the accused and witnesses alike, [*Murphy vs. Waterfront Commission,* 378 US 52 at 94 (1964), (White, J. concurring), *Counselman vs. Hitchcock,* 142 US 547 (1892)]. The privilege is more than a mere rule of procedure and has been held to be a fundamental right, protected against the states by virtue of the Fourteenth Amendment, (*Malloy vs. Hogan,* supra).

In this case Respondents have presumed wrongful intent by the mere assertion of the privilege. They have made a hollow mockery out of the privilege itself. They have condemned before any hearings. They have inflicted arbitrary and coercive punishment before investigation. They have not only punished Petitioners for the claim of a lawful right, they have abrogated one of the fundamental underpinnings of the system under which justice is sought. The issue is not whether Petitioners can recover from the injury but *whether the Respondents have any jurisdiction over the claim of privilege or any authority under the law to impose the injury in the first place.*

Although Petitioners have claimed the protection the law allows they have been punished for doing so. This court has declared:

> The privilege against self-incrimination is fulfilled only when a person is guaranteed the right to remain silent unless he chooses to speak in the unfettered exercise of his own will. *Miranda v. State of Arizona,* 86 S. Ct. 1604

While a witness must reply to specific questions and cannot refuse to provide any information, Respondents have no authority to impose *any* penalty for withholding incriminating disclosures to specific questions. Neither should claimants have to consider how much it will cost in penalties or sanctions for claiming the right the law allows. [*Sherar vs. Cullen,* 41 F2d 945, (1972) (4th Cir)]

POINT II

The Examiner, Respondent Connors herein, is given NO POWER to enforce compliance or to impose sanctions for non-compliance, *Reisman vs. Caplin,* 375 US 440 at 445 (1964) emphasis added.

The question of imposing penalties for the assertion of Constitutional Privilege against self-incrimination by the imposition of sanctions to compel testimony that has not been immunized was decided by this court as recently as June 13, 1977 in *Lefkowitz vs. Cunningham,* 431 US 801. In that case there was a coercive statute that punished one who claimed the privilege. In this case it is individuals, the Respondents, who deny the Petitioners' lawful claim of privilege as they might deny a tax deduction or exemption. Respondents then subject or cause Petitioners to be subjected to a heavy penalty which must be paid before judicial review is possible. In every Federal Case cited by the respondents in brief we see, of necessity, the involvement of the judiciary. But not in this case. Here the Respondents presume to intrude into the arena of the judiciary; passing on the validity of a claim of Fifth Amendment Privilege and imposing sanctions in direct violation of the language of *Reisman,* supra.

In *Garner vs. US,* supra, we see the element of timeliness as essential to maintain the privilege. Garner had made disclosures and subsequently tried to claim the privilege that had been lost

thereby. Had Garner invoked the privilege to specific questions on his tax returns, as was done in this case, the tax authorities could have administratively completed the return or sought judicial involvement to punish the taxpayer for willfully failing to file. The identical options are available to the tax authorities of the State oi New York, however, the Respondents did not choose to proceed in this lawful manner; but rather converted Petitioners' lawful, timely, and valid claim of privilege into a wrongful act and found Petitioners "guilty" of violating §685(i) of the State Tax Code. If claiming the privilege could be punished by imposing a civil penalty as in this case, it would be solely at the discretion of the opponents of whomever claimed the privilege as to whether that privilege would be priced out of the reach of the very citizens whom it was intended to protect.

POINT III

Petitioners have been subjected to a coercive punishment for claiming the privilege which the law allows.

The privilege against compelled self-incrimination could not abide any attempt, regardless of its ultimate effectiveness, to coerce a waiver of the immunity it confers. *Sanitation Men vs. Comm'r of Sanitation*, 392 US 280.

In the United States District Court for the Western District of New York counsel for Warrant Agents David Fields and Ronald Bradshaw Jr. declared that both names were fictitious (see addendum pages A-4 & 5). The stated purpose of the deception is, "to identify particular forms mailed to taxpayers in order to facilitate handling correspondence when a reply is received". Conspicuously absent is any explanation of the official title "WARRANT AGENT" printed in big bold letters under the name. The use of this title is not a vain and useless gesture nor was the impact lost on the Petitioners. It is a critical element of a coercive scheme to obtain money by means of false pretenses fabricated to punish Petitioners for refusing to waive the protection the law allows.

Paragraph 3 (addendum page A-5) presents the manner in which responsibility is evaded by stating that personal service was not effected. However, the matter of personal service was not an objection for only nonexistent persons. An attorney, Max Kuperman, accepts the Complaint and Summons from the Federal Marshall allowing the matter of lack of personal service to be raised with any complaint of alleged wrongful conduct.

POINT IV

The state misled the district court by misstating the reason for the penalty.

In his decision Judge Burke stated, "Thereafter, on August 24, 1978, plaintiff was assessed a $950.00 penalty pursuant to §685(i) of the Tax Law *for failure to file a return* (emphasis added).

This argument was advanced by the respondents in their memorandum of law in support of the motion to dismiss. The Notice and Demand for Payment for the assessments against the Petitioners clearly states that the reason for the amounts due is "Penalty under §685(i) of the tax law for failure to submit information requested in our previous correspondence. Copy of our letter is enclosed." (see Addendum page A-6). The letter in question requests additional information to complete an audit of petitioners' tax returns for the year in question. The penalty, therefore, is administratively imposed for the claim and exercise of the Fifth Amendment Privilege.

POINT V

Court below improperly dismissed the complaint without applying the standards set forth in *Haines vs. Kerner,* 404 US 519 at 520.

This Court in *Haines vs. Kerner,* supra, has set forth a standard for this type of dismissal.

> We cannot say with assurance that under the allegations of the Pro Se complaint, which we hold to less stringent standards than formal pleading drafted by lawyers, it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief (citations omitted).
>
> Accordingly although we intimate no view whatever on the merits of Petitioner's allegations, we conclude that he is entitled to an opportunity to offer proof. Supra at 520, 521

The Petitioners herein submit that the Courts below erred in not taking this into account in their decisions.

CONCLUSION

It is not the practice of the Federal Tax authorities to attempt to apply this type of civil penalty to taxpayers who have interposed claims of Constitutional Privilege, therefore Petitioners believe that this is a case of first impression before this Court.

The Rights of citizens are fragile things which must be most carefully protected. Fundamental to this protection is the separation of the functions of our tripartite government. Whenever any branch of that government infringes the area of another branch and is allowed to continue that infringement our very system is in jeopardy. The most dangerous form of that infringement is when the Administrative branch encroaches on the territory of the Judicial branch. When administrative clerks, or Senior Audit Examiners, may act as "Judge, Jury, and

Executioner" the very lives of the citizens are threatened. It is this threat to our system of jurisprudence which, Petitioners submit, requires the intervention of this Court.

For these reasons Petitioners implore this Court to grant them relief.

Dated March 10, 1980

Respectfully submitted,

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Petitioner, Pro Se
242 S. Union Street
Spencerport, New York 14559
(716) 352-0239

DAVID H. GUST
Petitioner, Pro Se
399 Parma Center Road
Hilton, New York 14468
(716) 392-9369

ADDENDUM

ADDENDUM 1 — Letter of John J. Connors
To David H. Gust

New York State Department of
TAXATION and FINANCE
INCOME TAX BUREAU
STATE CAMPUS, ALBANY, NEW YORK 12227

Telephone (518) 457-5533

AG-2-CNA
File #7-49027040
Tax Year 1977

David H. Gust
399 Parma Ctr. Rd.
Hilton, N.Y. 14468

MAY 26, 1978

This refers to the audit of your 1977 New York State income tax return. In order that we may complete the audit of your return, it will be necessary for you to submit additional information.

Please submit a complete list of all income earned for 1977. Also, please submit the New York State copy of any wage and tax statements you received for 1977.

A reply is requested 30 days, referring to the division and file number shown above.

/s/ JOHN J. CONNORS
John J. Connors
Associate Income Tax Examiner
Audit Group 2

TJC/jtb

ADDENDUM 2 — Letter of John J. Connors
To Alan F. Taylor

New York State Department of
TAXATION and FINANCE
INCOME TAX BUREAU
STATE CAMPUS, ALBANY, NEW YORK 12227

Telephone (518) 457-5533

AG-2-CNA
File #7-49027054
Tax Year 1977

MAY 26, 1978

Alan F. Taylor
242 S. Union St.
Spencerport, N.Y. 14559

This refers to the audit of your 1977 New York State income tax return. In order that we may complete the audit of your return, it will be necessary for you to submit additional information.

Please submit a complete list of all income earned during 1977. In lieu of a list, you may submit a copy of your 1977 Federal income tax return. Also, please submit copies of any wage and tax statements you received during 1977.

A reply is requested within 30 days, referring to the division and file number shown above.

/s/ JOHN J. CONNORS
John J. Connors
Associate Income Tax Examiner
Audit Group 2

TJC/jtb

ADDENDUM 3 — Letter of David H. Gust
To John J. Connors

399 Parma Center Rd.
Hilton New York 14468
May 30, 1978

Mr. John J. Connors
Associate Income Tax Examiner
Audit Group 2

Dear Mr. Connors,

Referring to AG-2-CNA, file #7-49027042, I should like to submit the necessary information within the provisions of the law as it relates to the Fifth Amendment of the United States Constitution.

In Garner -v- United States, 74-100, Justice Powell, writing the unanimous opinion of the Court stated:

> "*If the taxpayer desires the protection of the privilege he must claim it instead of making disclosures.* Any other rule would deprive the government of its choice between compelling the evidence from the claimant in exchange for immunity, and avoiding the burdens of immunization and obtaining the evidence elsewhere."

The privilege I claim is waived when I answer the questions on the return. That is the clear unanimous holding of Garner.

Sincerely,
/s/ David H. Gust

ADDENDUM 4 — Letter of Attorney General To Judge Burke

STATE OF NEW YORK
DEPARTMENT OF LAW
ROBERT ABRAMS ALBANY, N. Y. 12224
ATTORNEY GENERAL

Telephone: (518) 474-5259

February 16, 1979

Re: GUST v. CONNORS
TAYLOR v. STATE TAX COMMISSIONER, et al.
Motion Term, February 12, 1979

Honorable Harold P. Burke
United States District Judge
272 United States Court House
100 State Street
Rochester, New York 14614

Dear Judge Burke:

At oral argument, I made reference to a recent decision by the United States Tax Court, *Allen* v. *Commissioner*, which is enclosed. Although the decision is not directly on point, it may be informative.

For the record, I repeat my objections to the additional actions commenced by Mr. Gust:

David H. Gust v. *Ronald Bradshaw, Jr.*
David H. Gust v. *David Fields*

These defendants were not personally served, nor could they be. These names are fictitious and are used by the Tax Compliance Bureau in its correspondence in order to identify the particular form mailed and facilitate handling when a reply is received.

ADDENDUM 4 — Letter of Attorney General To Judge Burke

To: Honorable Harold P. Burke February 16, 1979

It is respectfully requested that the complaints in each of the actions be dismissed because the Fifth Amendment privilege is improperly exercised here where there is no criminal investigation ensuing, merely the duty and responsibility of the Tax Commission to collect income taxes.

Respectfully yours,

ROBERT ABRAMS
Attorney General

By

ROBERT T. MULIG
Assistant Attorney General

Enc.
cc: Mr. David H. Gust
Mr. Alan F. Taylor

State Campus, Albany, New York 12227

NOTICE AND DEMAND FOR PAYMENT OF INCOME TAX DUE

PERIOD OR YEAR	DATE OF ASSESSMENT	FILES REFERENCE NO	ASSESSMENT NO
1977	07-25-78	49027040	R78L720C430

DAVID H GUST
399-PARMA CTR RD
HILTON NY 14468

THIS IS A NOTICE AND DEMAND FOR PAYMENT OF THE AMOUNT DUE SHOWN ON THE LINE BELOW.

PERSONAL INCOME TAX	UNINCORPORATED BUSINESS TAX	TOTAL TAX	INTEREST
.00	.00	.00	.00
PENALTY	**PENALTY**	**TOTAL PENALTY**	**TOTAL TAX PEN & INT**
950.00	.00	950.00	950.00

PREVIOUSLY PAID .00
UNPAID BALANCE 950.00
ADDITIONAL PEN AND OR INT .00
AMOUNT DUE 950.00

— KEEP THIS NOTICE FOR YOUR RECORDS —

▲ PAY THIS AMOUNT ▲

The reasons for the AMOUNT DUE are as follows:

* PENALTY UNDER SECTION 685(I) OF THE TAX LAW FOR FAILURE TO SUBMIT INFORMATION REQUESTED IN OUR PREVIOUS CORRESPONDENCE. COPY OF OUR LETTER IS ENCLOSED.